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Supreme Court of the United States

OCTOBER TERM 1964.

No. 363

LUCY C. SIMONS,

Petitioner,

vs.

MIAMI BEACH FIRST NATIONAL BANK, as Executor of the Estate of SOL SIMONS, Deceased,

Respondent.

PETITION FOR REHEARING

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PETITION FOR REHEARING.

Comes now the petitioner, LUCY C. SIMONS, and respectfully files this, her petition for rehearing from the opinions and judgment of the Court affirming the decree of the District Court of Appeal of Florida, Third District. It is urged that while the opinions are not all based upon the same theory, there is a fundamental error which goes to the correctness of each of the opinions which, if reconsidered, would call for a different conclusion.

Briefly stated, the error is that the opinion as announced does not take into consideration whether or not the prior separation decree of the Supreme Court of New York under the full faith and credit clause of the Constitution, Article IV, Section 1, and the statute adopted pursuant thereto, U. S. C. A., Title 28, §1737, voids the ex parte divorce decree in Florida of 1952, when it was based on identically the same grounds and facts upon which the issues were determined contrary to the husband's conten-

tion in the New York judgment. In the petition for certiorari which was granted, as shown on page "15" under the heading "REASONS FOR GRANTING THE WRIT", the first point was as follows:

> "The Courts of Florida have refused to give full faith and credit to the prior decrees of the State of New York in violation of Article IV, Section 1, of the United States Constitution."

The second point was as follows:

> "The Courts of Florida have denied to the widow, Lucy C. Simons, her constitutional property rights to which she was entitled under the laws of the State of New York by the mere subterfuge of an ex parte divorce case in the Courts of Florida, where the Florida Court did not have jurisdiction because of the lack of proper residence."

In support of the first point the petitioner relied upon the decision of this Court in the case of *Gene Durfee, ex ux., Petitioners,* v. *Julia E. Duke,* 375 U. S. 106, 84 S. Ct. 242, and the decisions relied upon by this Court in that opinion, particularly the case of *Sherrer* v. *Sherrer,* 334 U. S. 349, 68 S. Ct. 1090, 92 L. Ed. 1429.

With reference to the second point, to-wit: the residential and domicile status of Sol Simons in Florida in the spring of 1952, we pointed out (see page 16 of the petition for certiorari) that the lower Court, to-wit: the Circuit Court of Dade County, Florida, did not pass upon the validity of the domicile and residential facts appearing in the record in the 1952 divorce case in Florida, but that the opinion of the lower Court was predicated solely upon the application of the doctrine of the case of *Macfadden* v. *Muckerman* (Fla. App. 1959), 116 So. 2d 448, opinion by the District Court of Appeal of Florida, Third District.

From the mere reading of the opinion as reported it would appear that the Florida Appellate Court had held that the rule prohibiting any attack by a party to a divorce action in Florida for intrinsic fraud was applicable in a case where the defendant had appeared in the original litigation and contested the issue, as well as a case where a mere service by publication had been utilized. The lower Court placed that construction upon that case over the objection of counsel for petitioner that such a construction was erroneous and conflicted with the due process clauses. Actually the reported case, as set forth in the text at page 448, merely refers to the action to set aside the decree of divorce in the Circuit Court of Dade County, Florida on January 9, 1946. That divorce decree was filed in case No. 77430-A, in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, and the style of the case was *Bernarr Macfadden, plaintiff*, v. *Mary Macfadden, defendant*, and even though the suit was instituted and service was first obtained by service by publication, the defendant, Mary Macfadden, actually appeared in person and by and through an attorney, testified in the case and a final decree was entered granting the divorce after a thorough contest. Under those circumstances that opinion in the Macfadden case was correct in its conclusions, and on that principle would be sustained by the ruling of this Court in the case of *Sherrer* v. *Sherrer*, 334 U. S. 343, 68 S. Ct. 1087. In the *Sherrer* case, and we quote from 68 Supreme Court Reporter, at page 1093, this Court said:

> "It is one thing to recognize as permissible the judicial reexamination of findings of jurisdictional fact where such findings have been made by a court of a sister State which has entered a divorce decree in ex parte proceedings. It is quite another thing to hold that the vital rights and interests involved

> in divorce litigation may be held in suspense pending the scrutiny by courts of sister States of findings of jurisdictional fact made by a competent court in proceedings conducted in a manner consistent with the highest requirements of due process and in which the defendant has participated. We do not conceive it to be in accord with the purposes of the full faith and credit requirement to hold that a judgment rendered under the circumstances of this case may be required to run the gantlet of such collateral attack in the courts of sister States before its validity outside of the State which rendered it is established or rejected."

If we correctly construe this statement by this Court and its reference to and apparent approval of the cases set forth in the footnotes, then this Court has never held that where a service by publication has been used as a basis for an ex parte divorce decree attempting to bind a wife who has never left the state of the domicile, that she is forever barred from questioning that Court in a foreign state as to its jurisdiction to award a divorce a vinculo matrimonii and to annul any benefits which she has in a complete separation decree in the only state where the parties had ever been domiciles for matrimonial purposes, and where that separation decree was entered in a contested matter where both parties were before the Court. We will set out hereinafter certain features of the record which clearly show that the lower Court in dismissing the cause of action did so only on one point, and that is that under the *Macfadden* decision by the District Court of Appeal of Florida, Third District, Lucy C. Simons could not be heard to complain about the validity of the proceedings in Florida unless she could show extrinsic fraud.

The transcript of the printed record now before this Court, page 151, shows the position taken by Mr. Marion

E. Sibley, attorney for the respondent, on his motion to dismiss the petitioner's case before the Judge of the Circuit Court, and we quote:

> "Mr. Sibley: If your Honor please, as I stated at the outset, the question of residence is not involved in this litigation. The question of residence was involved in the original litigation, which was the divorce, in which the defendant was given an opportunity to defend and elected not to defend, in which the District Court of Appeals said the plaintiff has appealed from an order dismissing a bill of complaint in the nature of a bill of review to set aside a decree of divorce entered in the Circuit Court of Dade County, Florida, on January 9, 1946. The order dismissed the cause with prejudice and without leave to amend.
>
> Now, they allege in that case that Macfadden, during his life, had filed this suit, and they brought in afterwards where he had sworn he was a resident of New York and ran for some office up there during the period of time that he contended he was a resident of Florida. That case was dismissed, and the Court said in the case at bar, the appellant seeks to collaterally attack the decree some thirteen years after its rendition upon grounds which constitute intrinsic rather than extrinsic fraud.
>
> The rule is and has been that those issues that could or have been litigated in the proceedings themselves are not sufficient grounds to collaterally attack a decree which otherwise appears to be valid on its face. As opposed to intrinsic fraud, the bill of complaint does not, in our opinion, allege facts which would constitute extrinsic fraud such as the deceased husband's fraudulently keeping the appellant from defending the action, keeping her in ignorance of the proceedings, or other misconduct that would deprive the wife of an opportunity to have defended the action.

> Now, that brings us down to one point, only one point. Has the plaintiff, by her conclusive proof, or well nigh conclusive proof, convinced your Honor that the husband actually represented facts which prevented the wife and induced the wife not to defend, or is your Honor of the opinion that there were other advices given to her which caused her not to defend these proceedings, and upon which she relied that the divorce in Florida would not be recognized in New York?"

It is further reflected in the record and pointed out in the brief of the petitioner herein on the merits, wherein as shown in the record at page 209, in line with the position Mr. Sibley had taken as shown in the previous record on page 151, the lower Court confined its sole findings on the fact that the plaintiff had not shown that she had been lulled into inaction after she received notice of the 1952 Florida divorce proceedings. That was the only issue he mentioned (see Tr. 209):

> "They were dealing at arm's length. He was angry with her, because she had brought these proceedings to increase the alimony, and she had to have it done legally. But she had nothing done legally about stopping the divorce here.
>
> (p. 210) After she talked to him, she went to a man who said that the Florida divorce was no good. The attorney may have given her a false sense of security.
>
> From the evidence here, I do not think Mr. Simons did, and I discount her testimony as to their conversation. I do not think it is true."

Then in the final order of dismissal (see printed record in this Court, p. 315) the Court simply said that the Court adopts as its findings the observation made by the Court at the conclusion of the final hearing. The lower Court did

not make any finding upon the testimony that Mr. Simons was actually a resident and domiciled in Florida in 1952, sufficient to give the Florida Court jurisdiction to enter an ex parte divorce against his wife in New York. The lower Court did not even purport to pass upon the question of full faith and credit which had to be accorded to the prior proceeding and decree of separate maintenance in New York. The lower Court, to-wit: the trial Court, did not even mention or take recognition in any fashion of the effect of that decree in New York.

This Court in its several opinions by the various Justices has taken the position that counsel for the petitioner in the oral argument abandoned the claim which was set forth in Point II in the petition for certiorari. We have not been afforded the opportunity of actually having a transcript of the argument and, therefore, we can not question that something may have been said that would lead this Court to feel that the petitioner had abandoned that point.

We did and do now question the jurisdiction of the Florida Courts to have granted a valid divorce by ex parte proceedings in 1952. This point was made in the petition for certiorari and was followed by the argument in the printed brief of petitioner on the merits. We regret that there was anything said at the oral argument from which this Court could have based its finding and we respectfully urge that this case, involving as it does many important questions of law, should not be determined upon any such statements, but should be controlled by the record and the written petition for certiorari and the written briefs. The petitioner does not concede that the Florida ex parte divorce decree was valid and binding upon her. The decree in the lower Court, as we have above pointed out, did not pass upon this issue. The only finding as to juris-

diction is in the 1952 decree itself, based as it was wholly upon the substituted service by publication. This case should turn primarily in this Court on whether full faith and credit of the decree in New York in 1946 has been given by the Florida Court. We say that it was not, which we will attempt to demonstrate.

This Court many years ago in the case of *Adelaide M. Harding, plaintiff in error* v. *George F. Harding, defendant in error,* 198 U. S. 317, 25 S. Ct. 679, decided practically every point which is involved in the case at bar. In that case the wife filed a suit in Illinois for a separate maintenance decree based upon grounds for divorce, to-wit: cruel treatment and adultery by the husband. The husband, who was also living in Illinois in the City of Chicago, answered the complaint and denied the charges of cruelty and other misconduct and averred that the complainant was living apart solely through her own fault. The case went to issue and after extensive taking of testimony the Court there held for the wife and against the contentions of the defendant, the husband. The husband prosecuted an appeal to the Appellate Court of Illinois for the First District, but before the appeal was perfected, on August 31, 1897, he commenced in the Superior Court of San Diego, California, a suit against his wife for divorce. The plaintiff claimed that he had set up a residency in the State of California in 1895, which, according to the date set forth in the opinion, was approximately five years after this suit had been filed in the Circuit Court of Cook County, Illinois. The sole ground alleged by him for divorce was the wilful desertion by the wife in the month of February, 1890. The wife received notice of that suit and appeared in the California Court. Before the trial took place in California the Illinois Appellate Court had affirmed the Circuit Court of Cook County. The wife set forth in her answer the

decree in Illinois as amended by the opinion of the Appellate Court, but the California Superior Court found in favor of the husband, and upon appeal of that decree to the Supreme Court of California that Court affirmed the decree (140 Cal. 690, 74 Pac. 284).

This Court, in an opinion by Mr. Justice White, pointed out (see text, p. 683, 25 S. Ct.):

> "As we have said in stating the facts, after the bringing of the suit for separate maintenance, in which charges of the gravest character were made against the husband as to cruelty, adultery, etc., much testimony had been taken with regard to the charges. * * *"

Then the Court concluded (text, p. 686):

> "We are of opinion that the final decree of July 26, 1897, entered in the circuit court of Cook county, Illinois, in legal effect established that the separation then existing, and which began contemporaneously with the filing of the bill in that cause in February, 1890, was lawful, and therefore conclusively operated to prevent the same separation from constituting a wilful desertion by the wife of the husband. From these conclusions it necessarily follows that the issue presented in this action for divorce was identical with that decided in the suit in Illinois for separate maintenance. This being the case it follows that the supreme court of California, in affirming the judgment of divorce, failed to give to the decree of the Illinois court the due faith and credit to which it was entitled, and thereby violated the Constitution of the United States."

This decision in *Harding* v. *Harding*, to the best of our knowledge and after detailed research, has never been departed from by this Court, but has been followed in numer-

ous decisions by various other Courts. This decision, unless it should be reversed or receded from by this Court, conclusively determines that in the case at bar the Florida Court in this case erred in failing to give full faith and credit to the New York decree of separate maintenance.

The only point that is not squarely settled by the *Harding* case, *supra,* as applicable to this case, was whether assuming that the wife had not entered into the Superior Court of California at San Diego and set up that defense in that particular case, or whether she had refused upon advice to enter her appearance in that case in California, could she thereafter ever challenge the California decree.

Assuming that the California Court was at some time entitled to have the Illinois decree brought to its attention before it could be asked to give full faith and credit to it, just when is that time? This Court, and in turn the Florida Supreme Court in the case at bar and in other cases so far as we have been able to ascertain, has never passed upon that point. We think that is the sole question for determination by this Court in this case and that that was the controlling point which the petitioner raised for decision and determination by this Court on this petition for certiorari. Other Courts have passed upon that same situation in applying the doctrine of *Harding* v. *Harding, supra.*

In the case of *Bowen* v. *Bowen,* Supreme Court of Iowa, (Feb. 12, 1935), 258 N. W. 882, an identical situation as involved in the case at bar was presented. From the opinion it appears that Mr. and Mrs. Bowen had married at Rock Island, in the State of Illinois, on the 29th day of November, 1916, and they lived as man and wife at Rock Island until the 14th day of March, 1930, and at the time of this opinion in 1935 the wife still lived there. The opinion pointed out that some time prior to the month of March, 1932, the wife

filed in the State of Illinois an action against the husband for separate maintenance. The husband appeared in the case and filed a cross-complaint for divorce, and a decree was entered on the 2nd day of March, 1932. The Court dismissed the husband's cross-complaint for divorce on the merits and in the same decree granted a separation decree to the wife for separate maintenance on the ground that the husband had on March 4, 1930, without any reasonable cause, wilfully deserted and abandoned himself from the wife, and found that the husband was guilty of extreme and repeated cruelty as charged in the complaint. Shortly after that decree was entered the husband instituted an action for divorce in the State of Nevada and sought to get jurisdictiontion by publication of notice. The wife learned of that action and appeared in the Nevada Court and filed an answer setting up the decree in Illinois. On the 28th day of May, 1932, a decree was entered by the Court in Nevada dismissing the plaintiff's petition for divorce on the ground that the matters had been adjudicated by the decree in Illinois. About one year later, on March 30, 1933, the husband filed a petition against the wife in the District Court of Woodbury County, Iowa, and caused a notice to be published in the Sioux City Stylus, a newspaper published at Sioux City, Iowa. The wife did not appear, default was entered and a divorce granted to the husband. The divorce upon which the Iowa decree of divorce was granted found that the defendant in violation of her marriage vows and without any fault of the plaintff, wilfully deserted the plaintiff and has ever since absented herself from him without any reasonable or just cause, and also found cruel and inhuman treatment. Within a year after the entry of that decree the wife then filed a petition in that case and the question raised by the petition, as set forth in the opinion (258 N. W., text

884), was whether that divorce decree granted by the District Court of Woodbury County, Iowa should be set aside because of fraud practiced in obtaining it. The Trial Court refused to set aside the decree. An appeal was taken to the Supreme Court of Iowa. That Court reversed the lower Court. The Court said (see text, 258 N. W., p. 884, second column):

> "* * * the effect of the decree entered in the court in the state of Illinois granting the wife separate maintenance was to determine that the wife was entitled to a divorce from appellee, and, more particularly, that she was entitled to such divorce because the husband had deserted her on the 14th day of March, 1930, and on the further ground that he had treated her with extreme cruelty.
>
> In view of the fact that there had been an adjudication of the question of the husband's right to a divorce and that adjudication was binding on the district court of Woodbury county, Iowa, could the husband obtain a divorce there except by the practice of fraud?"

We quote further from page 885, first column:

> "No claim is made on behalf of the husband that the court was, in fact, advised as to these other adjudications. It is to be presumed that, if the court had been so advised, he would have done what an express provision of the Constitution of the United States (art. 4, §1) required him to do, give full faith and credit to the judgment entered by the court in the state of Illinois between these same parties with reference to this same issue, and would have therefore dismissed the husband's petition. The failure of the court to do that, therefore, must be held to be the result of the deception practiced upon it. That a failure to disclose in a hearing on a default divorce

case that there has been a prior adjudication of the issue has been held by this court to constitute such fraud in obtaining the decree as will require its being set aside on petition. See Wood *v.* Wood, 136 Iowa, 128, 113 N. W. 492, 12 L. R. A. (N. S.) 891, 125 Am. St. Rep. 223.

The husband's conduct in this case shows, not only that he perpetrated the fraud involved in the failure to disclose the prior adjudication, but that he deliberately planned an opportunity to do so. It will be noticed that, although the decree entered by the court in the state of Illinois was not entered until the month of March, 1932, another decree was entered between the same parties in Nevada in May of the same year. The only explanation offered of the possibility of the husband obtaining a residence in Nevada in time to start a suit which would go to final determination by May is that he left Illinois before the final decree was entered in that case. It will be noticed also that he started an action in Woodbury county, Iowa, in March, 1933. As a witness at the hearing on the petition for a new trial, he said he became a resident of Sioux City, Iowa, on March 15, 1932. It will be noticed that this was very shortly after the time the decree was entered at Rock Island and over two months before the decree was entered in the state of Nevada. * * * The husband, however, apparently anticipating an adverse decision as soon as the wife appeared, left Nevada and took up his residence in Iowa before the final determination of the case in Nevada. The husband knew that such adjudication was a bar to his right to obtain a divorce when he started his action in Woodbury county. He must have known, therefore, that his success in obtaining a divorce at Sioux City depended upon keeping the adjudication in the state of Illinois out of the record, and to that end preventing the wife from learning of the pendency of the action."

Then in concluding the opinion, the Court said this:

> "There is a suggestion in the findings of the trial court that the decree granting separate maintenance to the wife in Illinois and the decree granting a divorce to the husband in Iowa are not necessarily in conflict and that the two might exist together, and therefore the decree granting separate maintenance to the wife was not conclusive on the question as to whether the husband could properly obtain a divorce. In the first place, this leaves out of consideration altogether the part of the decree entered by the state court in Illinois dismissing the husband's cross-complaint for divorce as being without equity. In the second place, it does not give proper effect to the decree granting separate maintenance."

The Iowa Court in the *Bowen* case, *supra,* cited as one of its authorities a previous opinion by that Court in *Wood* v. *Wood,* 136 Iowa 128, 113 N. W. 492. In that case that Court held:

> "A decree in a divorce suit may be assailed the same as any other judgment where property interests are directly affected, and may be vacated after the death of the parties."

An analysis of the facts in that case from the opinion will disclose that an annulment had been entered in the District Court of Linn County, Iowa in a suit brought by B. H. Wood against his wife, Celista H. Wood; that these parties were married at a time when the wife was sane; that thereafter she became insane and while she was in the insane asylum B. H. Wood filed a suit to annul the marriage. Notice was served upon her guardian. That suit was dismissed, but then a second suit was brought through a different attorney, but is was not brought out by the guardian ad litem in the second suit that there had been a prior

adjudication on the same issue. The two proceedings were identical. A decree was entered granting the annulment of the marriage. Wood then remarried. Thereafter both B. H. Wood and his former wife, Celista, the insane party, died. In a suit filed by the heirs of Celista H. Wood it was charged that B. H. Wood was guilty of fraud in bringing the second suit and he had concealed from the Court the fact that on identical issues the relief sought had been denied and adjudged against him. The Court said in holding for the heirs and personal representatives of Celista H. Wood:

> "The only basis for the action, then, is the fraud alleged to have been practiced in obtaining the decree. The parties thereto are both dead, and their status while living is no longer a proper subject of judicial inquiry, save as it may affect the property rights of their heirs or survivors."

Under the law of Iowa there was a certain statute of limitations in which suits of this type could be filed. There is no question of full faith and credit involved in this particular case, but the case is authority for establishing the principle that concealment from a Court by a plaintiff of prior adjudication of the same subject matter which has been determined adversely to his contentions is a fraud practiced upon the Court. We have searched the authorities and the principles laid down by the Supreme Court of Iowa in the two cases above mentioned have not been reversed or overruled.

In the case of *Rice* v. *Rice*, 336 U. S. 674, 69 S. Ct. 751, decided about one year after the *Sherrer* case, this Court held that where no personal service in a Nevada action upon the wife, who was a resident of Connecticut, and she did not participate in the Nevada proceedings, she was not

precluded from bringing an action in Connecticut after her husband's death for declaratory judgment that the Nevada divorce was colorable and did not dissolve the marriage, and that she was not prohibited from challenging the finding of the Nevada Court that the husband was at the time of the divorce domiciled in Nevada. The husband died after the entry of the Nevada divorce, which was an ex parte divorce decree. After his divorce decree in Nevada the husband, Herbert N. Rice, remarried. Then he died. The wife in Connecticut brought a suit seeking a declaratory judgment that a decree of divorce entered against her and in favor of her husband by the Nevada Court was not entitled to full faith and credit. She joined as a party defendant the new wife and the administrator of Rice's estate. The purpose of the action was to determine the widowhood status of the parties and to decide questions concerning the inheritance of the property of the decedent, who died intestate. There were three dissenting opinions.

It is apparent that some of the Justices of the Supreme Court of the United States have been in disagreement, but we respectfully submit that all any attorney can do in representing his clients is to follow the majority opinions to the best of his ability. We submit that the case now before this Court is a much stronger situation than was involved in the *Rice* case. Let us suppose for the sake of argument that after the twenty years of married life of Mr. and Mrs. Rice in Connecticut, Mrs. Rice had applied for and received a separation decree based upon grounds for divorce which determined all of the issues between the parties as to the right to the separation and the wrongful action of the husband, but which left the then Mrs. Rice as the legal wife and the then Mr. Rice as the legal husband. What would have been the result in that case if in spite of that decree

Mr. Rice had then gone to Nevada and failed to disclose that decree in the Nevada proceedings? Would the Connecticut wife have been required to follow her husband into whatever state or territory of the United States he saw fit to sojourn, whether it be for thirty days or for years? None of the acts complained of in the Nevada Court ever took place while the parties were domiciled with a matrimonial domicile in Nevada. How could the Nevada laws be offended? Would the wife have the right to rely upon the fact that she and her husband had never been matrimonially domiciled in another state other than Connecticut? Was she entitled to rely upon the solemn declaration of the duly constituted Courts of Connecticut? Why should a default be placed upon the wife because she was derelict in her duty of following the husband wherever he saw fit to go? Why was it not the fault of the husband when he goes to another state and fails to disclose the fact of prior judicial determination? This Court in the *Rice* case recognized the inherent property rights of the wife, even though there had been no prior adjudication of separation in the Connecticut Court, and declared that she was still the wife and widow of the husband. That law is not unique and that is the law of New York.

The case of *In re Smith's Estate—Smith* v. *Bank of Jamestown*, Supreme Court, Appellate Division, Fourth Department, 243 App. Div. 348, 276 N. Y. S. 646, opinion rendered in 1935, held that under the statutes of New York where a decedent died after August 31, 1930, a surviving spouse had the right to elect to take against the will, notwithstanding that there had been a judgment of separation obtained by the wife. That Court held (see Headnote 2):

> "Judgment of separation obtained by wife did not dissolve marriage relation, but operated merely

as cessation of cohabitation, and did not deprive wife of privilege of election to take against husband's will."

In one of the concurring opinions comment was made that petitioner's counsel had not furnished to the Court any authorities to show what the wife's right would be in New York after the separation decree of 1946 had been entered in favor of Lucy C. Simons against her husband. We respectfully say that we did. Both in the petition for certiorari and in the brief on the merits counsel for petitioner discussed the case of *Vanderbilt* v. *Vanderbilt*, 54 U. S. 421, 77 S. Ct. 1360. The New York law is covered both in the majority opinion and in the dissenting opinions. As a result of the majority opinion this Court affirmed the opinion and judgment of the Court of Appeals of New York (1 N. Y. 2d 342, 135 N. E. 2d 553, 153 N. Y. S. 1), and a reference to that opinion, as well as the opinions of the lower Court and the Appellate Division, will clearly disclose that the basic law of New York was discussed and particular references were made to the Civil Practice Act, particularly Paragraph 1170A. We contend that there is no dispute either in the Florida law or in the New York law that a separate maintenance decree granted by the appropriate Court in either of the states does not terminate the marriage and that the relationship of husband and wife still continues.

The United States Court of Appeals for the Second Circuit in the case of *Legget* v. *Commissioner of Internal Revenue*, 329 F. 2d 509, a 1964 decision, analyzed the Florida law as to a separation, stating (see text, p. 511, first column):

"The essence of a legal separation is that each spouse may live apart free from any claim of desertion or demand for cohabitation by the other." Quoting

with approval Florida Supreme Court opinions of Anders *v.* Anders, 153 Fla. 54, 13 So. 2d 603, and Martin *v.* Martin, Fla. S. Ct., 66 So. 2d 268.

That Court said in speaking of the Florida separation proceeding (text, p. 511, ¶2):

> "A wife who has obtained a decree under §65.09 should stand in an even better position with respect to a claim of desertion against her arising out of her husband's subsequent offer of reconciliation; she not only had grounds for divorce but has had them adjudicated. In Naurison *v.* Naurison, 108 So. 2d 510 (Fla. D. C. App. 1959), the court provided for the right of the wife to live separate from her husband in a decree under §65.09; we think it was doing only what the statute itself established, since any decree under §65.09 would have this effect."

A similar finding with respect to a Nevada divorce decree and its application against a resident of the District of Columbia, which we think is quite applicable here, is in the case of *Ryan* v. *Ryan,* 139 F. Supp. 98, opinion by District Judge Youngdahl. In this case the wife had signed some kind of an instrument as a part of a separation agreement which granted a power of attorney for someone to appear for her in Nevada. After the decree of divorce was entered in Nevada the wife filed suit in the United States District Court for the District of Columbia, and that Court said that she had not made the type of an appearance in Nevada that would prevent her from making a collateral attack upon the validity of that decree, and held that the Nevada divorce was not binding and was not valid and entered the relief for the wife. This opinion was affirmed by the United States Court of Appeals, District of Columbia, on March 8, 1956, 230 F. 2d 838. In the order of affirmance and approving the disposition of the case by the United States District Court, the Court said:

> "In order to do so it was, of course, necessary to declare the foreign decree invalid."

The Florida Supreme Court has recognized the decision of this Court in *Harding* v. *Harding*, 198 U. S. 317, 25 S. Ct. 679, 49 L. Ed. 1066, as well as the other opinions of this Court on the same subject as to the full faith and credit which had to be given to a separate maintenance decree of another state. This is the case of *Field* v. *Field*, a 1956 decision, 91 So. 2d 640. The husband had sued in Dade County, Florida for a divorce. The Circuit Court granted a divorce, but the Supreme Court on appeal held that a prior New Jersey separate maintenance decree for the wife barred the husband's action for divorce. In the body of the opinion the Supreme Court of Florida said (see text, ¶1, p. 641):

> "The New Jersey final decree is a conclusive adjudication that the husband, and not the wife, was at fault in the separation of the parties which occurred in February, 1951." • • •
>
> "It is clear that the New Jersey court acquired personal jurisdiction of Field, and that the final decree is binding upon him." • • •
>
> (See text, p. 642, second column)
>
> "The New Jersey decree of separate maintenance bars relitigation of the question of who was at fault in the separation, and establishes that the wife is living apart from the husband under a valid and binding separate maintenance decree of the court."

Conclusion.

No one so far in this case has ever questioned the jurisdiction of the New York Supreme Court in granting the separate maintenance decree in 1946. None of the parties

to the case have questioned that if it was not for the Florida decree Lucy C. Simons would have been the wife of Sol Simons when he died in New York some years afterwards. The opposing party in this case has not claimed or even questioned the fact that the divorce grounds and evidence submitted in the Floriad decree were not identical with the same grounds and same facts upon which the New York decree had ruled adversely to the husband, Sol Simons.

We do not find any limitation in Article IV, Section 1, of the United States Constitution, which fixes any statute of limitations. We do not find any such limitation in the statute passed by Congress under the power granted in that constitutional provision, U. S. C. A., Title 28, §1738. There is no showing of any action by the petitioner which would create any estoppel. The petitioner did not remarry. The husband, Sol Simons, did not remarry. There has been nothing shown in this case to invoke any doctrine of equitable estoppel or the doctrine of laches. The rule in New York, if that is applicable, is set forth in the case of *Marsh* v. *Marsh*, Supreme Court, Queens County, 1944, 49 N. Y. S. 2d 769. In that case a suit was filed by the wife for a declaratory judgment determining the plaintiff's status as the defendant's wife. The husband had purportedly gone to Pennsylvania and obtained a divorce, but the Court found he never actually became a resident of such state but that he continued as a resident of New York, so that the Pennsylvania decree granting him a divorce was invalid and without legal effect in New York. The Court then held that under the laws of New York the statute of limitations is no defense to an action for declaratory judgment. The Court held that laches is not mere delay, but delay that works disadvantage or injury. In headnote "4" the Court said:

> "A divorce decree, which is invalid at time of its rendition, and second marriage, which is invalid when contracted, will not become legal and binding by passage of time as to innocent divorced wife solely because of her failure to bring such decree and marriage into legal question, as in action for declaratory judgment determining her marital status, as soon as she knew of or suspected such facts."

In Florida the Supreme Court of Florida in the case of *Chisholm* v. *Chisholm*, 125 So. 694, and in *Kelly* v. *Kelly* (S. Ct. Fla.), 75 So. 2d 191, which cases are referred to at page 329 of the printed record, the Supreme Court of Flordia held that an attack upon a decree of divorce in Florida may be made where there has been no change in the status of the parties of a character which would have resulted in injury, embarrassment or disadvantage to the husband.

We respectfully contend that the petitioner is entitled to a rehearing and re-argument of this case, if it meets with this Court's approval. If after full consideration of this petition this Court deems it advisable, it should announce a new principle of law that a binding and conclusive decree rendered by a competent Court in the state of the marital domicile places the burden upon a wife to follow the husband, whose rights are barred by the decree, into every other state or territory of the United States and actually enter that litigation in that state or states before that Court actually makes a decree in an ex parte divorce case. The Florida Court in the *Field* case, *supra*, has held that if there is such a binding decree of a sister state, the husband is barred from litigating that question anywhere else. If the husband is barred, then how can some other state give validity in the face of the constitutional prohibition? How can that state when a proper attack is made

refuse to set any proceeding contrary to that decree aside? That is only the first phase of the case. The other phase, which we have not abandoned, is that the Courts of Florida under these circumstances are required to hear and consider the question of the jurisdiction of this Court and the validity of the claimed residence or domicile of the husband. The decisions are apparently unanimous that even New York or any other state where the party resides could make such an attack, why would such an attack be barred in Florida where there is a direct attack made and that Court rejects the wife's rights and even refuses to consider the evidence as to domicile. These two phases are present and a solution by this Court of these two important points would be not only of benefit to the petitioner, but would be of great benefit to the Bench and Bar.

Respectfully submitted,

WILLIAM GRESHAM WARD,
Attorney for Petitioner, Lucy C. Simons,
1240 duPont Building,
Miami, Florida 33131.

The undersigned, WILLIAM GRESHAM WARD, one of the counsel of record for the petitioner, LUCY C. SIMONS, and who has signed the petition for rehearing submitted as above shown, hereby certificates that said petition for rehearing is presented in good faith and not for delay, in accordance with the requirements of Rule 58, of this Court.

DATED at Miami, Florida, this day of May, 1965.

WILLIAM GRESHAM WARD

Pursuant to the requirements of Rule 33, Rules of the Supreme Court of the United States, the undersigned, WILLIAM GRESHAM WARD, one of the counsel of record for the petitioner, LUCY C. SIMONS, hereby certifies that copies of the above and foregoing petition for rehearing in the above entitled case have been served upon Marion E. Sibley and Irving B. Levenson, counsel of record for the respondent, at their office at 605 Lincoln Road, Miami Beach, Florida 33139, by depositing three copies of the printed petition in the United States Post Office, with first class postage prepaid, addressed to the said Marion E. Sibley and Irving B. Levenson, at the address above set forth, which is their official post office address and place of business.

DATED at Miami, Florida, this day of May, 1965.

WILLIAM GRESHAM WARD